OGC 73-2357

27 DEC 1973

The Honorable Robert H. Bork
Acting Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Bork:

Your letter of 14 December 1973 commenting on my memorandum of 28 November 1973, "Actions to Control Damaging Security Leaks," is much appreciated.

I concur in your view that the concentration should be on preventive measures as opposed to relying solely on prosecution, and I am calling on members of the United States Intelligence Board to give wide dissemination to a memorandum from me which puts emphasis on the individual and the need for motivating his personal commitment for the protection of intelligence.

You noted in your letter that "There has never been a prosecution for violation of §798, transmitting classified information relating to codes and communications intelligence." I am aware of one case, United States v. Petersen, wherein Petersen, an employee of the National Security Agency, was indicted under three counts: (1) 18 U.S.C. 793, (2) 18 U.S.C. 798, and (3) 18 U.S.C. 2071.

On 22 December 1954 Petersen entered a plea of guilty to count (2) of the indictment. One of the reasons for my mentioning this is that prosecution under § 798 is considered somewhat less difficult for the government than under the other statutes. This is believed to have been a factor in leading Petersen's attorney, a former NSA employee, to urge him to plead under § 798 rather than go to trial on all three counts.

Sincerely,

/s/ W. E. Colby

W. E. Colby

Original - Addressee
1 - DDCI
1 - ER
STATINTL OGC:JSWarner:sin [redacted] (20 December 1973)
1 - OGC SECURITY
STATINTL 1 - PRG [redacted]
1 - IC/Registry
1 - D/DCI/IC

Office of the Attorney General

December 14, 1973

Honorable William E. Colby
Vice Chairman
National Security Council
Intelligence Committee
Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Colby:

Your memorandum of November 28, 1973 to members of the National Security Council Intelligence Committee captioned "Actions to Control Damaging Security Leaks" requested comments from each member by December 15 as to the source or sources of recent leaks and measures which might be adopted to prevent similar leaks in the future. The leaks you referred to involved the recent publication of sensitive national security information in articles appearing in the Washington Post and New York Times.

The Federal Bureau of Investigation has advised that it has no information as to the identity of the source or sources of the leaks of information which appeared in the articles. As you may know, the FBI does not usually conduct investigations to determine the source of such leaks to the press since any investigation conducted by the Bureau would look toward prosecution rather than identifying sources. Unless prosecution is contemplated, the agency or agencies originating the classified information, which has been compromised through publication in the press, conducts its own inquiry to locate the source, after which administrative action may be taken against the person or persons responsible, if they have been identified.

The problems involved in the unauthorized leaking of sensitive data have been examined and reexamined by the Justice Department for many years as part of its responsibilities under certain federal statutes aimed at deterring unauthorized disclosures of national defense information, whether in the press, to foreign governments, or any other unauthorized persons. Currently, there are a number of criminal statutes which apply to unauthorized disclosures of sensitive information. For example, 18 U.S.C. §793 (gathering, transmitting, or losing defense information); 18 U.S.C. §794 (delivering defense information to aid foreign governments); and 18 U.S.C. §798 (disclosure of classified information relating to codes, cryptography or communications intelligence) appear to cover the situations referred to in your memorandum. Where government documents are taken, a prosecution under 18 U.S.C. §641 (theft of government property) may be possible.

Prosecutions for espionage usually arise where a person, who has been identified, transmits, conspires or attempts to transmit, defense information to an agent of a foreign government in violation of §§793 and 794. While these are the usual cases, there have been a few prosecutions over the years under §793 for disclosing defense information to persons not acting on behalf of foreign powers. There has never been a prosecution for violation of §798, transmitting classified information relating to codes and communications intelligence; nor have there been any prosecutions for disclosing national defense information to the press or for publishing the same. However, the current laws are adequate to encompass the latter type of activity and the problems we have encountered, in the main, have related to identifying the source and declassifying the information for prosecution.

We are well aware that foreign intelligence agents do use the newspapers for gathering defense information. See, A. Dulles, The Craft of Intelligence, 48-51 (1963).

However, any attempt to prosecute a reporter for writing, or a newspaper for publishing, articles containing even the most sensitive national security information, aside from being extremely controversial, is fraught with complicated legal and constitutional problems. A civil action to enjoin publication is virtually impossible, as witnessed by the 1971 Supreme Court decision in New York Times v. United States, 403 U.S. 713. The prosecution of defendants, who are neither newspaper reporters nor government employees for theft of government property and espionage, is also extremely difficult, as we have seen in the recent case of United States v. Anthony J. Russo and Daniel Ellsberg.

With any decision to prosecute the source of an unauthorized leak or the unauthorized recipient of classified information, in addition to other problems, we face the prospect of publicly verifying the accuracy of the compromised information. In a sense, we are put in the position of assisting foreign intelligence agencies in determining what is true and what is false, what is fact and what is fancy. Thus, it has always been a problem over the years that the government may suffer more by prosecuting. We believe, therefore, that prosecution is not the most effective solution, but rather greater efforts must be made by the agencies charged with safeguarding classified data.

The government must have an effective system for safeguarding sensitive information and must be able to rely on officials and employees involved in handling it. While Executive Order 11652, which became effective June 1, 1972, has done much to reduce unnecessary classification, tight security, particularly where employees in sensitive positions are in contact with the press, prompt investigation by the security staffs of the agencies involved, and effective disciplinary action once

the source has been identified appear to be the more realistic measures currently at our disposal. In sum, while we believe there is no single step which can be taken to solve this vexing and longstanding problem, we are of the view that the concentration should be on preventive measures as opposed to relying solely on prosecution.

Sincerely,

/S/

ROBERT H. BORK
Acting Attorney General

Approved For Release 2004/01/14 : CIA-RDP75-00793R000200160001-0

STATINTL D R A F T [redacted] 12/6/73

MEMORANDUM FOR: The Chairman and Members of the NSCIC

SUBJECT: Actions to Control Damaging Security Leaks

REFERENCE: My memorandum, dated 28 November 1973, subject as above (TS)

1. The recent spate of unauthorized disclosures of sensitive intelligence information poses a serious threat to our access to some important sources of information, and I am convinced that further action is necessary.

2. Admittedly the problem is not a new one, as is indicated by the materials at Tabs A and B.

3. As background information on the scope of the problem, Tab A is a listing of unauthorized disclosures for the period 1958 through October 1973, as contained in the data bank of the CIA Office of Security. This machine run tabulation certainly is not a complete list of unauthorized disclosures, since it does not contain any of the very flagrant disclosures of the past few weeks, but it is significant that the listing includes 208 separate public disclosures of classified intelligence information with no official sanction as compared with 11 authorized instances of deliberate disclosure of classified intelligence information. STATINTL

4. These 208 unauthorized disclosures include [PICK UP MATERIAL FROM [redacted] AS TO THE PUBLICATIONS INVOLVED, THE WRITERS INVOLVED, AND THE CLASSIFICATION OF THE UNAUTHORIZED MATERIAL. THIS WILL BE A BRIEF SUMMARY WITH ONLY HIGHLIGHTS OF THE INFORMATION.]

5. At Tab B is a chronology of official actions and correspondence related to unauthorized disclosure of intelligence materials. I think it is significant that over a period of years the President has, on four occasions, emphasized to members of his Cabinet and to heads of agencies the need to assure against leaks of sensitive information--President Eisenhower on 23 May 1960, President Johnson on 3 December 1966 and 16 February 1968, and President Nixon on 21 December 1970.

6. President Nixon stated:

> "I am becoming increasingly concerned about the disclosure in public media of classified information bearing upon important aspects of national security, particularly that which tends to jeopardize intelligence sources and methods. Such disclosures present a serious threat to our national interests and I am determined that the practice of releasing such information without proper authorization will be brought to an end."

7. Responding to President Nixon's memorandum, Mr. Helms reported on 17 February 1972 that:

> "Each member of the USIB has now reported to me on his implementing actions. These actions include strengthening existing controls on classified material, reviewing indoctrination procedures, reducing the number of clearances, and similar constructive measures. Special attention has been given to establishing procedures whereby the appropriate intelligence chief is consulted whenever it is proposed to issue public statements which may reveal sensitive intelligence information. In these cases the intelligence chief is expected to assess the risks involved and to devise methods to protect the source of such information."

8. While these strengthened controls and indoctrination procedures may have reduced the risk of unauthorized disclosure, it is obvious that they do not go far enough.

9. What those who release information and those who publish it may not fully realize is the monetary cost to the U.S. taxpayer which such leaks can represent. Such costs are difficult to determine with exactitude in many instances, but when disclosure of a COMINT codeword system requires complete change in the designator system we estimate the cost of that action alone is at least $500,000. When disclosure of the manner with which certain information is acquired renders that collection system useless (since the target can take new measures to insure against further access to the data) we lose the entire invested cost of the collection system, which can amount in some instances to many millions of dollars.

10. Somehow it is essential that we bring about a change in attitude on the part of those who are now disclosing sensitive information without authority and those who publish it without regard to what their actions mean not only in cost to the security of the United States but also in monetary costs to the American taxpayer in terms of rendering expensive collection systems useless.

11. As follow-on measures I am having drafted a legislative proposal dealing with the protection of sensitive intelligence sources and methods. [INSERT COMMENT FROM JOHN WARNER AS TO WHAT THIS LEGISLATION IS INTENDED TO ACCOMPLISH.] I also am preparing materials for dissemination to USIB principals, with a request that they once again call the problem to the attention of their personnel, [~~WHAT ARE THESE MATERIALS.~~] REMINDING THEM OF THEIR RESPONSIBILITIES FOR THE PROTECTION OF INTELLIGENCE.

12. It would be most helpful if each of you would make the point at meetings and conferences which you attend that continuation of the present situation in which sensitive intelligence is disclosed without consideration as to what the costs may be is not tolerable.

W. E. Colby

The purpose of this legislation would be to strengthen existing legislation so as to improve chances of conviction where there has been an unauthorized disclosure. Hopefully, such a statute would act as a deterrent.

TOP SECRET

UNCLASSIFIED when blank. TOP SECRET when attached to Top Secret Document. Automatically downgraded or declassified when filled in form is detached from controlled document.

CONTROL AND COVER SHEET FOR TOP SECRET DOCUMENT

DOCUMENT DESCRIPTION	
SOURCE	PRS/IC
DOC. NO.	
DOC. DATE	
COPY NO.	Copy #4
NUMBER OF PAGES	2
NUMBER OF ATTACHMENTS	—

REGISTRY	
CIA CONTROL NO.	
DATE DOCUMENT RECEIVED	STATINTL
LOGGED BY	

ATTENTION: This form will be placed on top of and attached to each Top Secret document received by the Central Intelligence Agency or classified Top Secret within the CIA and will remain attached to the document until such time as it is downgraded, destroyed, or transmitted outside of CIA. Access to Top Secret matter is limited to Top Secret Control personnel and those individuals whose official duties relate to the matter. Top Secret Control Officers who receive and/or release the attached Top Secret material will sign this form and indicate period of custody in the left-hand columns provided. Each individual who sees the Top Secret document will sign and indicate the date of handling in the right-hand columns.

REFERRED TO	RECEIVED			RELEASED		SEEN BY		
OFFICE	SIGNATURE	DATE	TIME	DATE	TIME	SIGNATURE	OFFICE/DIV	DATE
Ie Registry								
OLC								

NOTICE OF DETACHMENT: When this form is detached from Top Secret material it shall be completed in the appropriate spaces below and transmitted to Central Top Secret Control for record.

DOWNGRADED		DESTROYED		DISPATCHED (OUTSIDE CIA)	
TO		BY (Signature)		TO	
BY (Signature)		WITNESSED BY (Signature)		BY (Signature)	
OFFICE	DATE	OFFICE	DATE	OFFICE	DATE

Next 1 Page(s) In Document Exempt

Approved For Release 2004/01/14 : CIA-RDP75-00793R000200160001-0

28 November 1973

Major General Brent Scowcroft, USAF
Deputy Assistant to the President for
National Security Affairs
The White House
Washington, D. C. 20500

Dear Brent:

I have signed the attached but will hold the copies for the other members of the NSCIC until you advise me that it is all right with Secretary Kissinger, in whose name as Chairman I am speaking.

Sincerely,

/s/ Bill

W. E. Colby
Director

Attachment:
Memo to Members of the NSCIC, Subj:
Actions to Control Damaging Security
Leaks (TS 205242/73)

WEC:blp
Distribution:
Original - Addressee
1 - ER
1 - DCI
1 - D/DCI/IC
1 - DDCI

TRANSMITTAL SLIP	DATE
TO: OLC - Sue	
ROOM NO.	BUILDING
REMARKS: IC - registry will provide you with the attachments	
FROM: ER	
ROOM NO.	BUILDING / EXTENSION

FORM NO. 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

Approved For Release 2004/01/14 : CIA-RDP75-00793R000200160001-0

73-2311

28 November 1973

Major General Brent Scowcroft, USAF
Deputy Assistant to the President for
National Security Affairs
The White House
Washington, D. C. 20500

ILLEGIB

Dear Brent:

I have signed the attached but will hold the copies for the other members of the NSCIC until you advise me that it is all right with Secretary Kissinger, in whose name as Chairman I am speaking.

Sincerely,

/s/ Bill

W. E. Colby
Director

Attachment:
Memo to Members of the NSCIC, Subj:
Actions to Control Damaging Security
Leaks (TS 205242/73)

WEC:blp
Distribution:
Original - Addressee
1 - ER
1 - DCI
1 - D/DCI/IC
1 - DDCI

P/.35:/4

DCI/DDCI

Routing Slip

TO:

		ACTION	INFO.			ACTION	INFO.
1	DCI			11	IG		
2	DDCI			12	D/PPB		
3	DDS&T			13	SAVA		
4	DDI			14	ASST/DCI		
5	DDO			15	AO/DCI		
6	DDM&S			16	EX/SEC		
7	D/DCI/IC	✓		17			
8	D/ONE			18			
9	GC			19			
10	LC			20			

SUSPENSE _____
Date

Remarks: Pls release the copies to the other members — and follow up final para

DCI/~~DDCI~~
12/3/73

5-
15 [illegible]

STATINTL

Copy to [redacted]
Security, ~~XXX~~ 5 Dec 73.

SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

UNCLASSIFIED | CONFIDENTIAL | SECRET

OFFICIAL ROUTING SLIP

ATINTL

TO	NAME AND ADDRESS	DATE	INITIALS
1	[redacted] IC/PRG 6E2914 Hqs.		
2			
3			
4			
5			
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

ATINTL

Remarks:

[redacted]

Attached is a proposed comment to be inserted in your paragraph 11, right after your first sentence.

ATINTL

[redacted]

John S. Warner

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
ATINTL Acting General Counsel, ext [redacted]	12/6/73

UNCLASSIFIED | CONFIDENTIAL | SECRET

FORM NO. 237 1-67 Use previous editions (40)

DCI/DDCI

Routing Slip

TO:

		ACTION	INFO.			ACTION	INFO.
1	DCI			11	IG		
2	DDCI			12	D/PPB		
3	DDS&T			13	SAVA		
4	DDI			14	ASST/DCI		
5	DDO			15	AO/DCI		
6	DDM&S			16	EX/SEC		
7	D/DCI/IC	✓		17			
8	D/ONE			18			
9	GC		✓	19			
10	LC			20			

SUSPENSE _____
Date

Remarks:

Draft acknowledgment

ps

_____
DCI/DDCI